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FOREWORD

DISCOVERING THE VIRTUES OF RIPARIANISM

A. Dan Tarlock*

Blessed with abundant supplies, the eastern third of the United States long enjoyed the relative luxury of managing its water resources with a minimal operative legal system. In the past thirty years, population growth and the increasing demand for environmental protection and recreation have put new stresses on eastern water resources. The common assumption was that these stresses would increase water consumption and thus shortages would occur. States responded with a variety of statutes regulating water use that modify the common law in many respects. However, no coherent theory of eastern water allocation similar to that which once existed in the West has emerged.

This lack of "coherence" in eastern water management has often been a source of dismay to eastern water law scholars. Commentators have long followed the now unutterable line from *My Fair Lady*. Writers have repeatedly asked "why can't the East be more like the West?" The common law of riparian rights has been criticized by lawyers for failing to provide adequate advance standards for the resolution of disputes; economists find the lack of certainty inefficient because the vagueness of the common law of riparian rights *in theory* fails to provide sufficient incentives for investment in water-dependent activities.¹ The standard proposed remedy was the replacement of the common law with an administrative regulatory scheme which subjected all major uses of water to a permit requirement. Proponents of administrative regulation split over the standard to allocate water during periods of scarcity. True westerners have advocated a strict priority system.² On the other

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¹ Johnson, *An Optimal State Water Law: Fixed Water Rights and Flexible Market Prices*, 57 Va. L. Rev. 345 (1971), remains the best synthesis of this literature.

² E.g., Trelease, *The Model Water Code, The Wise Administrator and the Goddam Bureaucrat*, 14 Nat. Resources J. 207 (1974).

hand, priority was long opposed by the late dean Frank Maloney of the University of Florida. He advocated the exercise of equitable discretion rather than strict enforcement of a priority schedule.³ The problem is that the very idea of a comprehensive permit as the solution for eastern water is wrong because it is based on an erroneous conception of the resource.

Eastern resources are stressed, but the major problems are the protection of instream uses rather than the regulation of consumption. Withdrawals declined between 1980 and 1985. Industrial, commercial and mining withdrawals declined 33% during this period.⁴ There are many reasons for this, some of them cyclical, but the trend suggests that much eastern water law reform has been misfocused and that the assumptions driving reform need to be reexamined.

Viewed from an environmental perspective, many of the supposed defects in the common law of riparian rights are virtues, starting with the extreme indeterminacy of the common law. Students of eastern water management have often missed this point because they have assumed that the most valuable attribute of both surface and groundwater resources was their consumptive potential rather than the maintenance of something approximating the maximum steady mass balance in the system. Much eastern water law scholarship fails to take into account the crucial differences between the East and West and to construct a modern "humid region" water law premised on the differences.

The major difference between the two regions is that the East is not a drought-driven culture as is the West. Westerners have correctly pointed out that the East is vulnerable to short term droughts and that population growth can stress available supplies, but the fact remains that the East has more than adequate supplies for the foreseeable future and thus there is no need to construct a legal regime premised on the risk of chronic shortage. Projected global warming scenarios can be read to bolster the need to consider new allocation strategies, but these scenarios do not require a system premised on maximum consumption. For example, a rise in the average temperature of southern Florida may produce higher ocean levels and greatly increase the risk of salt water intru-

³ E.g., Maloney, Capehart and Hoofman, *Florida's "Reasonable Beneficial" Water Use Standard: Have East and West Met?*, 31 U. Fla. L. Rev. 253 (1979).

⁴ W. Solley, C. Merk and R. Pierce, *Estimated Use of Water in the United States 1985*, at 70 (U.S. Geological Survey Circular No. 1004, 1988).

sion. To combat this risk, larger base flows and aquifer reserves must be maintained.

In the pre-stream power era, current was the most valuable stream attribute and the natural flow theory developed to protect a mill economy. As the mill economy declined, courts began to appreciate the fact that it would be efficient to increase the consumption of many streams and they began to develop a law of consumption through the reasonable use theory. Reasonable use soon developed into a post-hoc law of tort damages. Today, we are again beginning to realize that stream flow is the most valuable attribute of our rivers and streams. This insight, of course, does not preclude consumption of the resource. It does suggest that consumption must be reconciled with other resource values and may often have to be minimized. In a recent lecture before the Water Science and Technology Board of the National Academy of Sciences, the distinguished hydrologist Luna Leopold advocated a new water management ethos:

Decisions in the field of water development and management should aim toward the preservation of the hydrologic continuum. . . .By hydrologic continuum I mean the effective operation of forces in the drainage basin that maintain a balance among the processes of rock weathering, soil formation, water, and sediment delivery to channels and the exit of water and sediment from the basin."⁵

This is crucial insight that applies to all water systems and counsels against the adoption of past western water law allocation models. Imitating the West is particularly inappropriate today as more and more westerners have begun to question the consequences of a century of drought-driven water allocation.⁶ Historically, the West has responded to the specter of drought by constructing a network of large reservoirs and distribution systems that provide a margin of safety against crop failure and try to forestall perpetual urban and municipal rationing. But the withdrawal of federal subsidies for water resources development is forcing the West to develop a more sophisticated response to shortages. Ironically, the West is now rejecting the core idea of appropriation, the ability to use water away from the watershed of origin. Western states are mov-

⁵ Leopold, *Ethos, Equity, and the Water Resource*, 32 *Environment* No. 2, 16, 19 (March, 1990).

⁶ The leading article is Wilkinson, *Aldo Leopold and Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine*, 24 *Land & Water L. Rev.* 1 (1989).

ing toward a watershed protection principle through a number of statutes and judicial decisions which restrict the export of water from the watershed of its origin.⁷ In short, the East has an opportunity to develop a set of legal institutions suited to the nature of the resource rather than to simply copy western institutions.

This symposium is distinguished for its forward-looking focus. In varying degrees, all the authors focus on present eastern problems and go beyond simple calls for comprehensive permit systems based on the law of prior appropriation. The articles bring new insights to existing allocation institutions and suggest some important new directions for the future.

Professor Robert Abrams breaks new ground by questioning the need for comprehensive permit systems in the East. His article, *Water Allocation By Comprehensive Permit Systems in the East: Considering A Move Away From Orthodoxy*, draws a crucial distinction between management and comprehensive allocation systems. He develops a set of criteria to evaluate water resource management decisions and finds that a comprehensive regulation is not necessary to achieve these criteria and may sometimes be a variance with the achievement of the criteria. Professor Abrams surveys specific conflicts such as deep versus shallow wells and interbasin transfers to show how ad hoc allocation solutions may be cheaper and more effective than comprehensive permit systems.

Because almost all eastern states have adopted some form of permit system, George Sherk's article, *Eastern Water Law: Trends in State Legislation*, sensibly examines these systems and is a useful survey of the current state and utility of eastern water rights legislation. Permit systems are increasing for a variety of reasons. States need water use information for planning purposes; in the Great Lakes states, permit systems are seen as a means of preventing interstate diversions. Mr. Sherk has organized the various permit systems into a number of categories such as threshold levels and allowable uses which provide a clearer picture of the structure and purpose of this legislation. Interestingly, the primary focus of the article is on the recent incorporation of environmental values into eastern water management.

The traditional test of a permit system has been how it will function in times of shortage. Westerners have long argued that

⁷ DuMars and Minnis, *New Mexico Water Law: Determining Public Welfare Values in Water Rights Allocation*, 31 Ariz. L. Rev. 817 (1989), is a good application of this new thinking.

eastern states should adopt priority of use as the allocation rule in times of shortage. This has been vigorously opposed by some easterners who argue that most shortages are short term ones that are best handled by pro rata sharing or other ad hoc allocations. Mr. Sherk, good westerner that he is, detects a strong trend toward priority over equitable sharing in the recent eastern permit statutes. The issue is whether states will in fact adhere to priorities when municipal, industrial and environmental values as opposed to irrigated agriculture are at stake in short-term emergencies. Since the expectations of security of supply are less, as most users from electric utilities to municipalities have a greater capacity to adapt to short-term emergencies, the states' willingness to follow these priorities is doubtful.⁸

Water resources are first commons and second commodities, and the increasing recognition of this attribute will shape the future of water management. The important question is the consequence of this classification. If no property rights regime exists in a commons, the tragedy of overuse results. But, it does not follow that all commons must be divided into private property regimes rigged only to minimize overuse. Commons can be managed by a combination of private and public rights. Eastern states are increasingly accepting the principle that they must be managed as public resources to preserve their most valuable attributes.

Both the East and West are using the state's police power over common property resources to restrict private rights in favor of public rights but such moves arouse resentment because of the nineteenth century tradition of dividing commons among private claimants. Resentment takes the form of due process challenges to state regulation, but the state has much greater power to restrict private rights in water compared to land. Common lands have been broken up, but eastern water resources are not subject to similar firm investment-backed property rights. Water has historically been subject to the public right of navigation, and this serves as the basis for the modern law of public management.

Professor Lynda Butler of the College of William and Mary draws on this tradition to argue for the increased recognition of water as "inherently public property" and thus to make the case

⁸ See United States Geological Survey, National Water Summary 1985: Hydrologic Events and Surface Water Resources 33-34 (U.S. Geological Survey Water-Supply Paper No. 2300, 1986) for a detailed case study of the way in which the Delaware Basin institutions responded day by day to the 1984-1985 drought.

for environmental management. *Environmental Water Rights: An Evolving Concept of Public Property* is notable for its application and extension of modern common property theory. Both welfare economics and political theory are used to provide a powerful justification for the greater recognition of public rights and a public interest in water bodies. The recognition that waters are public commons does not exclude the recognition of private rights, but the boundary will be different from the past. Nineteenth century property theories rest on the assumption that the public interest is commodity exploitation. Today, commodity exploitation is one of several equally important uses and thus the presumption that society's interest is always best served by the assignment of clear private rights no longer holds, and Professor Butler provides a rich foundation for the difficult line drawing problems which states must confront.